73-174

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Supreme Court, U. S.
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JUL 25 1973
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

JOHN A. MONDAY, **73-174**

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

JOHN A. MONDAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

John A. Monday prays that a writ of certiorari issue to review the order affirming judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 4, 1973.

CITATION TO OPINIONS BELOW

The opinion of the District Court, printed in Appendix B, infra, is not reported. The opinion of the Court of Appeals, printed in Appendix A, infra, is reported in _____ F.2d _____.

JURISDICTION

The order affirming judgment of the Court of Appeals was entered and is printed in Appendix A, infra. Rehearing was denied on June 4, 1973. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTION PRESENTED

Whether there is imposed upon the United States Government a duty to comply with lawful statutes and regulations of the Internal Revenue service and code.

STATUTES AND REGULATION INVOLVED

The Statutory provisions involved are Secs. 6202 and 6203 of the Internal Revenue Code of 1954, 26 U.S.C. Secs. 6202, 6203, c. 736 68A Stat. 768:

THE REGULATION INVOLVED IS SEC. 301.6203-1

Sec. 6202. Establishment by regulations of mode or time of assessment.

If the mode or time for the assessment of any internal revenue tax (including interest, additional amounts, additions to the tax, and assessable penalties) is not otherwise provided for, the Secretary or his delegate may establish the same by regulations. (Aug. 16, 1954, ch. 736, 68A Stat. 768.)

Sec. 6203. Method of assessment.

The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary

or his delegate in accordance with rules or regulations prescribed by the Secretary or his delegate. Upon request of the taxpayer, the Secretary or his delegate shall furnish the taxpayer a copy of the record of the assessment. (Aug. 16, 1954, ch. 736, 68A Stat. 768.)

TREASURY REGULATIONS ON METHOD OF ASSESSMENT (1954 Code)

Sec. 301.6203-1. Method of Assessment.

The district director shall appoint one or more assessment officers, (including assessment officers in a Service Center servicing his district,) and the assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period (,) if applicable, and the amount of the assessment. The amount of the assessment shall (,) in the case of tax shown on a return by the taxpayer, be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If the taxpayer requests a copy of the record of assessment, the district director (or the director of a Service Center) shall furnish the taxpayer a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

Source: TD 6119, approved December 30, 1954.

History: Sec. 301.6203-1 of TD 6119 was amended by par. 1 of TD 6425, approved November 5, 1959, by adding material enclosed in ( ).

Republished as TD 6498, approved October 17, 1960.

CONSTITUTIONAL PROVISION INVOLVED

Amendment to the Constitution:

Amendment 5

> No person shall be . . . deprived of . . . property, without due process of law.

STATEMENT OF THE CASE

This is a tax refund action in which the issues are whether Robert W. Monday, plaintiff, and John A. Monday, third-party defendant and petitioner herein, were persons responsible, under 26 U.S.C.A. Sec. 6672, to collect and pay over withholding taxes of the employees of the P. C. Monday Tea Company for the third and fourth quarters of 1960 and, if so, whether any failure to collect and pay over was willful.

In June of 1968 a jury verdict was returned which found that both Robert W. Monday and John A. Monday were persons responsible to collect and pay over the taxes but that any failure to do so was not willful. The Government moved for judgment notwithstanding the verdict and for a new trial.

These motions were denied, Monday v. United States, 294 F. Supp. 1384 (E.D. Wis. 1969), and the Government appealed. The court of appeals reversed the judgment of the lower court on the ground that the jury had been improperly instructed on the question of willfulness. Monday v. United States, 421 F. 2d 1210 (7th Cir. 1970). The court reversed with instructions to enter judgment for the United States and against the appellant, John A. Monday, and to grant a new trial to Robert W. Monday on the question of his willfulness. The court then ordered, in denying petitions for rehearing, that judgment against John A. Monday not be entered until the trial court had considered the matters discussed in footnotes 7 and 8 of the opinion of the court of Appeals. Monday v. United States, supra, at 1218-1219. A petition for writ of certiorari was denied by the United States Supreme Court, Monday v. United States, 400 U.S. 821. Upon retrial the jury in the lower court found that Robert W. Monday did not willfully fail to pay over taxes withheld from employees of the P. C. Monday Tea Company for the third and fourth quarters of 1960. The Government chose not to appeal the verdict and judgment of the lower court in that regard.

After the mandate of the appeals court was received, the appellant, John A. Monday, filed a motion to strike Exhibit "19" in the original trial and to dismiss the third-party complaint. Monday argued that the certification attached to Exhibit "19" states that John A. Monday's assessed liability is for the third and fourth quarters of 1964, whereas the complaint alleges that the liability was for the third and fourth quarters of 1960. It is Monday's position that this discrepancy is jurisdictional and requires dismissal of the third-party complaint.

The Trial Court denied petitioners motion to strike the Certificate of Assessment and entered Judgment against petitioner in the amount of $11,948.17 (Exhibit "B").

The Court of Appeals affirmed (Exhibit "A").

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is in direct conflict with the decisions of the Fifth and Ninth Circuit Court of Appeals and the regulations of the Commissioner of Internal Revenue.

John A. Monday filed a motion in the lower court moving any praying that Exhibit "19" be striken from the record and the third-party complaint be dismissed. The certification attached to Exhibit "19" designates the assessment as in the amount of $11,948.17 covering the third and fourth quarters of 1964. The third-party complaint against John A. Monday designates an assessment in the amount of $11,948.17 covering the third and fourth quarters of 1960. The matter of the assessment was first placed in issue by the third-party answer of John A. Monday and objections were raised during the trial and the motion to strike was denied without prejudice by the trial court.

Unless the Government introduces into evidence a proper assessment establishing a prima facie case of liability on the part of the defendant, the lower court is without jurisdiction to enter a judgment against John A. Monday.

The mechanics of the burden of proof in cases such as this was established in United States v.

Rindskopf (1882), 105 U.S. 418, 26 L. Ed 1131, repeated recently in United States v. Molitor (C.A. 9, 1964), 337 F. 2d 917 at 923:

> "Upon introduction of the assessment in evidence a prima facie case of liability on the part of the defendant, is made. The burden of proof then falls upon the defendants, who may proceed to introduce evidence to overcome the assessment by showing that the defendant did not, during the period covered by the assessment, manufacture and remove from his distillery spirits upon which the tax was not paid.
>
> "And upon it being so made to appear, the burden of proof then shifts to the plaintiffs, and it then becomes incumbent on the plaintiffs, to maintain and establish the correctness of the assessment by sufficient and competent evidence. ... The order of proof which has been maintained upon the trial is in consonance with the rules of law applicable to such a case, which have just been stated."

There is a fatal variance between the pleading and the proof. The pleading sets forth a liability for the third and fourth quarters of 1960 while the proof is in the nature of a certificate of assessment showing a liability covering the third and fourth quarters of 1964.

This fatal variance furnishes the basis for a dismissal of the third-party complaint and also a dismissal under Rule 50 for directed verdict or in the old common law a demurrer to the evidence sustaining a dismissal and can be raised at any

time prior to the entry of judgment or by way of motion in arrest of judgment thereafter.

The regulations of the Commissioner of Interna Revenue and more specifically Section 301.6203-1 states in effect that the commissioner in its certificate of assessment shall provide the taxable period involved in the assessment when rendering its certificate.

The cases of Brafman v. United States, 384 F. 2d 863, (C.I.R. 5), Gallion v. United States, 389 F. 2d 522, (Cir. 5) and United States v. Coson, 286 F. 2d 453 (Cir. 9), all hold that in construing Sec. 6203 of Title 26 and the aforementioned regulation of the commissioner that said regulation and statute must be complied with in all respects within the statutory period of time or the alleged assessment is null, void, valueless and of no effect, thereby depriving the court of jurisdiction to enter a judgment.

Applying the above citations of authority to this case it would appear that the Government does not have a prima facie case, that the certificate is null, void and of no effect and the lower court had no jurisdiction to enter judgment and the complaint should be ordered dismissed as against John A. Monday.

CONCLUSION

Petitioners pray that a writ of certiorari issue for the foregoing reasons.

Respectfully submitted,

MARGADETTE M. DEMET
Counsel for Petitioner

Of Counsel:
Francis J. Demet, Esq.

June , 1973

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Heard February 27, 1973
May 4, 1973

Before

HON. ROGER J. KILEY, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. WILLIAM J. CAMPBELL, Senior District Judge[1]

(Caption Omitted)

ORDER

In this tax refund action, the issues were whether plaintiff Robert W. Monday and his brother, John A. Monday, the third-party defendant, were responsible corporate officers (under 26 U.S.C. Sec. 6671 (b)) who willfully failed to collect and pay over withholding taxes of employees of the P. C. Monday Tea Company for the third and fourth quarters of 1960 in violation of 26 U.S.C. Sec. 672. In June 1968, a jury found that both Mondays were responsible for remitting these taxes but that their failure to do so was not willful.

[1] Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

On the prior appeal of the Government, we held that the jury had been improperly instructed on the question of the Mondays' willfulness, entitling Robert Monday to a new trial. As to John Monday, we reversed the judgment of the district court with instructions to enter judgment for the United States because the evidence of his willfulness was so conclusive that a contrary verdict could never stand. Monday v. United States, 421 F. 2d 1210 (7th Cir. 1970), certiorari denied, 400 U.S. 821. In denying petitions for rehearing, we ordered the district court not to enter judgment against John Monday until it considered (1) whether there was an administrative practice that the Government would not press its claim against the responsible officers where the corporate obligation had been met and, if so, (2) whether the Commissioner's computations of the amount of taxpayers' liability was proper insofar as the Government might have collected any of the $7400 of P. C. Monday Tea Company accounts receivable, which had been assigned to the Government by the company's bankruptcy referee.

Upon retrial, the jury again found in favor of Robert Monday as to willfulness. With respect to John Monday, the district court determined that he was liable for the taxes in issue and filed an unreported memorandum opinion to that effect. John Monday has appealed from the adverse judgment against him.

Appellant John Monday's principal argument is that the district court should have stricken Government Exhibit 19 and dismissed the Government's third-party complaint on the ground that the certificate of assessment pertains to the third and fourth quarters of 1964, whereas the third-party

complaint covers the third and fourth quarters of 1960. Since this argument goes beyond the expressly limited issues for which the case was remanded, the district court was correct in holding that John Monday was not free to interject it. Nevertheless, the district judge took pains to address the argument on its merits, and we concur in his resolution.

Exhibit 19 consisted of three documents:

1. The district director's blue certificate stating that he had compared the attached copy of the original assessment certificate with the original assessment certificate relating to the third and fourth quarters of 1964 and that it was a true copy thereof.

2. A copy of the Form 236 assessment certificate dated October 16, 1964.

3. A copy of the certificate of assessments and payments of John A. Monday reflecting liability for the third and fourth quarters of 1960 and certified by the district director to be a true and complete statement.

We adopt the following reasoning advanced by the district court in denying the motion to strike and dismiss:

> "Monday's motion to strike the exhibit is based on the recital on W. S. Stumpf's blue certificate (document 1 of Exhibit 19) that the assessment against John A. Monday is for the third and fourth quarters of 1964, not 1960 as alleged in the third-party complaint. This recital is

an obvious clerical error. It should recite an assessment for the third and fourth quarters of 1960. The fact that the 1964 date is an error is made clear by reference to the third document of Exhibit 19 - the Certificate of Assessments and Payments - showing John A. Monday's liability for the third and fourth quarters of 1960. The error is further evidenced by the fact that the Assessment Certificate is dated October 16, 1964, and thus could not reflect any assessment for the fourth quarter of 1964 which ended on December 31, 1964. In addition, Monday has made no showing whatsoever that he was disadvantaged by the erroneous date on the blue certification. The error is not shown to have affected any of Monday's rights. Rule 61 of the Federal Rules of Civil Procedure. Finally, the error complained of does not relate to the assessment itself but rather only to the document certifying the authenticity of the Assessment Certificate."

Next, appellant urges that he was entitled to a jury trial by virtue of the Seventh Amendment. In our earlier opinion, we granted a judgment notwithstanding the verdict against John A. Monday. 421 F. 2d at 1217. This was reconfirmed in our order on petition for rehearing subject only to the district court's resolution of the two issues stated above. Again, the district court was required to follow our mandate, and any contention that our disposition was incorrect would be proper only before us, by way of petition for rehearing, or before the Supreme Court, by way of petition for certiorari. However, the district court was, of course, correct that we were empowered to grant judgment n.o.v.

by Section 2106 of the Judicial Code.[2] It is well settled that such action does not violate the constitution. Neely v. Eby Construction Company, 386 U.S. 317, 322.

On remand, the Government conceded that there was an administrative practice whereby it does not seek collection of withholding and social security taxes from a responsible officer when it has collected them from his corporation. But the district court held that the appellant failed to show that any monies had been collected by the Government from the P. C. Monday Tea Company in satisfaction of the trust fund liabilities at issue. Nevertheless, appellant claims that the Commissioner's $11,948.17 assessment against him should be reduced by $3,167.57 because the Internal Revenue Service allegedly did not apply $3,167.57 to the Government's most recent tax claims, in violation of the bankruptcy referee's order. See 421 F. 2d at 1218. However, appellant's argument is not that the $3,167.57 was collected from the company and then assessed against him contrary to conceded administrative practice. Rather he objects to the

[2]Section 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." (28 U.S.C. Sec. 2106)

manner in which the Government applied this money received in the bankruptcy proceeding to satisfy its tax claims. But the referee did not have the authority to direct the Government to apply the involuntarily paid money in any particular manner of satisfaction of its valid claim.[3] O'Dell v. United States, 326 F. 2d 451, 456 (10th Cir. 1964). The chronology of satisfaction was in the discretion of the Government.

Appellant also asserts that the district court should reduce the assessment against him in the amount of $7400 in accounts receivable of P. C. Monday Tea Company assigned to the Government by the bankruptcy referee. The Government realized nothing from that assignment, and the record

[3]Although not advanced by the Government during the first appeal, there is a plausible construction of the referee's order such that it did not purport to direct application of the monies collected according to a particular chronology of established corporate tax liability. The order provided that the distribution of bankruptcy funds received by the Government should "be first applied to the most recent of the amounts claimed to be due to the United States from the Trustee and continuing as against the next more recent claims and so on, with the remaining amount being applied against the claim of the United States as allowed herein" (emphasis supplied). Here the trustee in bankruptcy ran the P. C. Monday Tea Company for a short time and incurred a tax liability of $169.48, and this liability is arguably what the referee intended to be wiped out in reverse chronological order. The Internal Revenue Service did first apply the distribution to satisfy the liability incurred by the trustee.

on the first appeal indicates that the accounts receivable were probably valueless.[4] Furthermore, as the district judge held, the assessment against appellant should not be reduced to this extent because he was the officer responsible for seeing that the withholding taxes were paid over, regardless of any failure of the Government to use due diligence to collect the accounts receivable.[5] See Datlof v. United States, 370 F. 2d 655, 656 (3d Cir. 1966), certiorari denied, 387 U.S. 906; Cash v. Campbell, 346 F. 2d 670 (5th Cir. 1965). As long as the Government has not been paid, it may look to the responsible officers for satisfaction.

Finally, appellant claims that the district court should have reduced his assessment by the $4500 that was paid to the Government in March 1961 by the P. C. Monday Tea Company. He now states that the payment was made against the tax delinquencies of the third and fourth quarters of 1960, as owed here, rather than for the first quarter of 1961. However, the district court found the $4500 payment was to be applied against the corporation's tax obligations for the first quarter of 1961, and appellant himself so testified at the first trial. See 421 F. 2d at 1213. With such support in the record, the district court was also justified in not reducing the assessment by this amount.

Judgment affirmed.

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[4]See page 264 of the Appendix filed on the first appeal herein.

[5]Appellant made no effort to have the Government collect the accounts receivable, and of course the statute of limitations has now run as to them.

APPENDIX B

MEMORANDUM OPINION AND ORDER FOR JUDGMENT
(Caption Omitted)

This is a tax refund action in which the issues are whether Robert W. Monday, plaintiff, and John A. Monday, third-party defendant, were persons responsible, under 26 U.S.C.A. Sec. 6672, to collect and pay over withholding taxes of the employees of the P. C. Monday Tea Company for the third and fourth quarters of 1960 and, if so, whether any failure to collect and pay over was willful.

In June of 1968 a jury verdict was returned which found that both Robert W. Monday and John A. Monday were persons responsible to collect and pay over the taxes but that any failure to do so was not willful. The Government moved for judgment notwithstanding the verdict and for a new trial. These motions were denied, Monday v. United States, 294 F. Supp. 1384 (E.D. Wis. 1969), and the Government appealed. The court of appeals reversed the judgment of this court on the ground that the jury had been improperly instructed on the question of willfulness. Monday v. United States, 421F. 2d 1210 (7th Cir. 1970). This court's judgment was reversed with instructions to enter judgment for the United States and against John A. Monday and to grant a new trial to Robert W. Monday on the question of his willfulness. The court of appeals then ordered, in denying petitions for rehearing, that judgment against John A. Monday not be entered until this court had considered the matters discussed in footnotes 7 and 8 of the

opinion of the court of appeals. Monday v. United States, supra, at 1218-1219. The only matters presently pending before this court under the court of appeals mandate relate to John A. Monday.[1]

After the mandate of the court of appeals was received, the third-party defendant John A. Monday filed a motion to strike Exhibit 19 in the original trial and to dismiss the third-party complaint. Monday argues that the certification attached to Exhibit 19 states that John A. Monday's liability is for the third and fourth quarters of 1964, whereas the complaint alleges that the liability was for the third and fourth quarters of 1960. It is Monday's position that this discrepancy is jurisdictional and requires dismissal of the third-party complaint. John A. Monday has also moved for a jury trial on the issue of his willfulness. It is Monday's contention in this regard that the court of appeals in directing the entry of judgment against him deprived him of his constitutional right to a jury trial.

If this court were to grant the motion to strike Exhibit 19 and dismiss the third-party complaint or grant a new trial on the issue of willfulness, it would be acting contrary to the mandate of the court of appeals directing the entry of judgment against John A. Monday. A district court is required to follow the mandate of a court of appeals and may not take action inconsistent with it. Paull v. Archer-Daniels-Midland Co., 313 F. 2d 612 (5th Cir. 1963). Any contention that a mandate of the

[1] Upon retrial the jury found that Robert W. Monday did not willfully fail to pay over taxes withheld from employees of the P. C. Monday Tea Company for the third and fourth quarters of 1960.

court of appeals is improper should be addressed to the court of appeals and not to the district court. Federal Home Loan Bank of San Francisco v. Hall, 225 F. 2d 349 (9th Cir. 1955); see Clark v. Travelers Indemnity Company, 328 F. 2d 819 (7th Cir. 1964). Consequently, both the motion to strike Exhibit 19 and the motion for a jury trial on the issue of willfulness must be denied. While I recognize that the foregoing authorities are determinative of the issues raised by the two motions of John A. Monday, I would like to add the following observations to indicate that no different result would have been reached if I were free to consider the motions on their merits.

In directing the entry of judgment against John A. Monday, the court of appeals in effect granted a judgment notwithstanding the verdict, which it was clearly empowered to do. Section 2106 of Title 28 U.S.C. provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

The constitutional propriety of the court of appeals granting a judgment notwithstanding the verdict was decided by the Supreme Court in Neely v. Eby Construction Co., Inc., 386 U.S. 317 (1967).

Exhibit 19 consists of three documents: (1) a blue paper which is the certification of W. S. Stumpf, District Director, that the "Assessment Certificate, Form 23C," attached thereto, has been compared with the original and is a true copy thereof; (2) the Form 23C, "Assessment Certificate," dated October 16, 1964; (3) a copy of the "Certificate of Assessments and Payments" of John A. Monday reflecting a liability for the third and fourth quarters of 1960, which has been certified by W. S. Stumpf to be a true and complete statement. Monday's motion to strike the exhibit is based on the recital on W. S. Stumpf's blue certificate (document 1 of Exhibit 19) that the assessment against John A. Monday is for the third and fourth quarters of 1964, not 1960 as alleged in the third-party complaint. This recital is an obvious clerical error. It should recite an assessment for the third and fourth quarters of 1960. The fact that the 1964 date is an error is made clear by reference to the third document of Exhibit 19--the Certificate of Assessments and Payments--showing John A. Monday's liability for the third and fourth quarters of 1960. The error is further evidenced by the fact that the Assessment Certificate is dated October 16, 1964, and thus could not reflect any assessment for the fourth quarter of 1964 which ended on December 31, 1964. In addition, Monday has made no showing whatsoever that he was disadvantaged by the erroneous date on the blue certification. The error is not shown to have affected any of Monday's rights. Rule 61 of the Federal Rules of Civil Procedure. Finally, the error complained of does not relate to the assessment itself but rather only to the document certifying the authenticity of the Assessment Certificate.

The mandate of the court of appeals directed that the entry of judgment against John A. Monday be deferred pending consideration of the matters referred to in footnotes 7 and 8 of the court of appeals decision. Footnote 7 raises the question of whether the Government has an administrative practice of not pressing its claim against responsible officers where the corporate obligation has been met. The Government has conceded that it does have such an administrative practice. The existence of such a practice gives rise to further questions concerning the correctness of certain aspects of the commissioner's computation of the amount of the assessment against John A. Monday.

Monday asserts that the assessment against him should be reduced by the amount of $7,400.00 is the value of accounts receivable of the P. C. Monday Tea Company, bankrupt, which were assigned to the Government by the bankruptcy court.[2] The record shows that no collection effort was taken by the Government and nothing has been realized from this assignment. In these circumstances the assessment against Monday should not be reduced because of the assignment of the accounts receivable since the individual responsible officer, and not the Government, has the responsibility for seeing that the withholding taxes are paid over. See Datlof v. United States, 370 F. 2d 655 (3rd Cir. 1966), cert. denied 387 U.S. 906 (1967); Cash v. Campbell, 346 F. 2d 670 (5th Cir. 1965).

Monday also contends that the assessment should be reduced by the amount of $3,167.57

[2] This is the matter referred to in footnote 8 of the opinion of the court of appeals.

which is a portion of the money received by the Government in the bankruptcy proceeding and applied to the obligation of the P. C. Monday Tea Company contrary to the order of the referee in bankruptcy. However, the money was applied to reduce the corporate liability, and John A. Monday, whose individual liability is separate from that of the corporation, does not have standing to object to the manner in which it was applied since a debtor whose debt is paid involuntarily may not direct the application of his funds as he chooses. O'Dell v. United States, 326 F. 2d 451 (10th Cir. 1964).

Finally Monday claims that the assessment should be reduced by the amount of $4,500.00, which was paid to the Internal Revenue Service in March 1961 at the request of its collection agent Pietrzak. John A. Monday testified at the trial in June 1968 that this amount was to be applied to tax obligations current in March of 1961. Consequently, this amount should not be taken into account in reducing the assessment for the third and fourth quarters of 1960.

The commissioner's computation of the assessment in the amount of $11,948.17 is correct.

For the foregoing reasons,

IT IS ORDERED that John A. Monday's motion to strike Exhibit 19 and dismiss the third-party complaint must be and it is hereby denied.

IT IS FURTHER ORDERED that John A. Monday's motion for a jury trial must be and it is hereby denied.

IT IS FURTHER ORDERED that John A. Monday's motion to review the commissioner's computation of the assessment against him be and it is hereby denied.

IT IS FURTHER ORDERED that the clerk of court enter judgment in favor of the defendant and third-party plaintiff, United States of America, and against the third-party defendant, John A. Monday, in the amount of $11,948.17, plus interest from November 16, 1964.

Dated at Milwaukee, Wisconsin, this 8th day of June, 1972.

/s/ John W. Reynolds.
U.S. District Judge

MOTION FOR REHEARING
(Caption Omitted)

June 4, 1973

Before

HON. ROGER J. KILEY, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Sr.
District Judge

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-174

JOHN A. MONDAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion and order for judgment of the district court (Pet. App. 8-14) is reported at 342 F. Supp. 1271. The opinion of the court of appeals (Pet. App. 1-7) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1973 (Pet. App. 1). A petition for rehearing was denied on June 4, 1973 (Pet. App. 15). The petition for a writ of certiorari was filed on July 25, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly denied petitioner's motion to strike an exhibit, one of the documents of

which contained a clerical error, and to dismiss the complaint because of such error.

STATUTES INVOLVED

The pertinent provisions of Sections 6202 and 6203 of the Internal Revenue Code of 1954 are set forth at Pet. App. 2-3.

STATEMENT

In June 1968, a jury verdict was returned finding that petitioner was a person responsible for collecting and paying over taxes withheld from the wages of employees of the P. C. Monday Tea Company during the third and fourth quarters of 1960 under Section 6671 of the Internal Revenue Code of 1954. The jury also found that his failure to do so was not willful under Section 6672 of the Code.

The court of appeals reversed, holding that the jury had been improperly instructed on the question of willfulness, and remanded with instructions to enter judgment for the United States against petitioner because the evidence of petitioner's willfulness was so conclusive that a contrary verdict could not stand. *Monday* v. *United States*, 421 F. 2d 1210 (C.A. 7), certiorari denied, 400 U.S. 821. The court of appeals denied rehearing but directed that judgment against petitioner not be entered until the district court had considered certain matters not in issue here.[1] (Pet. App. 1-7.)

After the mandate of the court of appeals issued, petitioner filed a motion in the district court to strike

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[1] The issues concerned (1) the administrative practice for collection of penalties from responsible officers, and (2) the computation of petitioner's liability (Pet. App. 2).

Exhibit 19, which had been introduced into evidence at the trial, and to dismiss the complaint. The ground of petitioner's motion was that one of the documents of the exhibit recited that the assessment related to the third and fourth quarters of 1964 although in fact the assessment related to the third and fourth quarters of 1960.

The three documents contained in Exhibit 19 were as follows (Pet. App. 3):

1. The district director's blue certificate stating that he had compared the attached copy of the original assessment certificate with the original assessment certificate relating to the third and fourth quarters of 1964 and that it was a true copy thereof.

2. A copy of the Form 23C assessment certificate dated October 16, 1964.

3. A copy of the certificate of assessments and payments of John A. Monday reflecting liability for the third and fourth quarters of 1960 and certified by the district director to be a true and complete statement.

Because of the discrepancy between the blue certificate (Document No. 1) which referred to the year 1964, and the assessment certificate (Document No. 3) and the complaint which both referred to the year 1960, petitioner contended that the exhibit should have been stricken. Petitioner further urged that the discrepancy between the two documents was jurisdictional and required dismissal of the complaint (Pet. App. 2-3).

The district court denied petitioner's motions and, in accordance with the remand instruction of the court of appeals, entered judgment against petitioner (Pet. App. 8-14). The issue with respect to Exhibit 19 was raised by petitioner for the first time in this case after the

remand by the court of appeals.[2] Because of the limited scope of the remand order, the district court held that petitioner could not then object to the introduction of an exhibit at the first trial (Pet. App. 9-10). Nevertheless, the district court noted that the motions were without substantive merit (Pet. App. 10-11). On petitioner's appeal from that adverse judgment, the court of appeals affirmed (Pet. App. 1-7).

ARGUMENT

The sole issue raised by petitioner is whether the district court correctly denied petitioner's motion to strike Exhibit 19 and to dismiss the complaint. Not only did the limited mandate of the court of appeals, in connection with the original remand of the case, preclude consideration of that issue but, as both courts below stated, the argument is without merit.

Petitioner's argument, at most, establishes clerical error which has not been shown to have prejudiced him.[3] The motion to strike the exhibit was grounded upon the recital on the blue certificate (Document No. 1) that the period covered by the assessment certificate (Document No. 2) was the third and fourth quarters of 1964. In actuality, the third and fourth quarters of 1960 were

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[2] Petitioner did not argue against the introduction of Exhibit 19 either during the initial (Government's) appeal to the Seventh Circuit or in his first petition for a writ of certiorari.

[3] The cases petitioner cites (Pet. 8) are inapplicable and do not provide the conflict of decisions alleged (Pet. 6). *United States* v. *Coson*, 286 F. 2d 453 (C.A. 9), involved the validity of a lien and not an assessment. *Gallion* v. *United States*, 389 F. 2d 522 (C.A. 5), held that the taxpayer could not bring a refund suit more than two years after notice of disallowance of his claim for refund had been mailed. *Brafman* v. *United States*, 834 F. 2d 863 (C.A. 5), while holding an assessment invalid, did so because the assessment was unsigned.

involved. As both the district court (Pet. App. 11) and the court of appeals (Pet. App. 3-4) recognized, the recital in Document No. 1 was an obvious clerical error. It should have recited that the period covered by the assessment certificate (Document No. 2) was the third and fourth quarters of 1960. The fact that the 1964 date was a clerical error is made clear in the certificate of assessments and payments (Document No. 3), which indicates that petitioner's liability was for the third and fourth quarters of 1960.

Petitioner has not alleged that he had not been assessed for the correct period, but merely that there was a discrepancy between the date in the complaint and the date on the document certifying the authenticity of the assessment certificate. He does not show that this discrepancy prejudiced him. The case presents no issue warranting review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1973.

DOJ-1973-09